

TRAVERSAL OF ELECTION/RESTRICTION REQUIREMENT

Restriction is required between:

Invention I, claims 1-3, 5, 9 and 10, directed to a tilt controlling method, classified in Class 369, subclass 53.19; and

Invention II, claim 11, drawn to a tile controlling apparatus comprising a RF and servo error producing unit, a servo controlling unit and a servo driving unit, classified in Class 369, subclass 44.11.

The Office Action states that inventions I and II are related as process and apparatus for its practice and that "the claimed method of controlling tilt can be practiced by another and materially different apparatus, such as one not having a detecting block for detecting the maximum and minimum values of a focus error per one rotation of a disk."

However, the Examiner has already examined this specific feature on its merits because this feature was included in claim 12 that was fully examined on its merits in the Office Action dated September 20, 2005 (in paragraph 10 found on pages 9 and 10 of that Office Action).

MPEP § 803 clearly states that even if the application contains independent and distinct invention, if the search and examination of the entire application can be made without serious burden, the Examiner must examine it on the merits.

The outstanding Office Action does not even address the issue of whether there is no serious burden on the Examiner and is improper at least for that reason.

Because the Examiner has completely addressed the features found in currently pending claim 11 in a previous Office Action on the merits, the Examiner has not demonstrated that the

search and examination of the entire application cannot be made without serious burden, especially where the Examiner has fully examined this claimed subject matter on its merits. Thus, the Examiner must examine claim 11 on its merits along with the other previously examined claims, i.e., all other pending claims

Moreover, Applicants have already paid for an examination of the subject matter in issue in currently pending claim 11 (which is actually a combination of previously pending, and examined, claims 11 and 12), and have paid the equivalent of a filing fee for another application by filing this Request for Continued examination (RCE). It is fundamentally unfair to require Applicants to file yet another Application to have the same subject matter that was already claimed and examined, examined again.

Applicants respectfully submit that this attempt to get Applicants to file yet another application in addition to this Request for Continued Examination (RCE) to have the subject matter of the pending claims examined, when that claimed subject matter has already been examined, completely violates Applicant's fundamental substantive and procedural due process rights under the Administrative Procedures Act. See in this regard, In re Zurko, 119 S.Ct. 1816, 50 USPQ2d 1930 (1999), and In re Gartside, 53 USPQ2d 1769 (Fed. Cir. 2000), as well as MPEP §707.07(a).

This Office Action goes even farther, however, and requires that if Group I is elected, that Applicants additionally elect between two allegedly "independent or distinct" species. However, the Office Action fails to provide any objective factual evidence that the two species are independent, i.e., it fails to demonstrate, or even allege, that these two species are disclosed

without any relationship therebetween, or if there is a disclosed relationship therebetween, provide a discussion of why the disclosed relationship does not prevent restriction, as required by MPEP §808.01(a). Nor does the Office Action provide any reasons why these two species are distinct. For these reasons alone, the election of species requirement is improper and should be withdrawn.

Furthermore, this election of species requirement is improper because the Examiner has already examined claims directed to both species and has provided no evidence that a serious administrative burden exists to continue to examine that subject matter in the pending Continued Examination of this Application.

Accordingly, the election /restriction requirement is improper and should be withdrawn.

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CONCLUSION

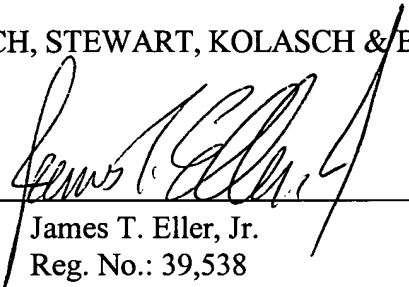
Applicants respectfully submit that the restriction and election of species requirements are improper for the aforementioned reasons, including the fact that they violate the requirements of MPEP §803, and should be withdrawn, and that all pending claims, i.e., claims 1-3 and 5-11 should be examined on their merits.

If necessary, the Commissioner is hereby authorized in this, concurrent, and future replies, to charge payment or credit any overpayment to Deposit Account No. 02-2448 for any additional fees required under 37 C.F.R. §§ 1.16 or 1.17; particularly, extension of time fees.

Respectfully submitted,

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